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Supreme Court of the United States

OCTOBER TERM, 1931

No. 265

L. A. NIXON, *Petitioner*,

against

JAMES CONDON AND C. H. KOLLE, *Respondents.*

RESPONDENTS' BRIEF.

THORNTON HARDIE,
BEN R. HOWELL,
Counsel for Respondents.

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Supreme Court of the United States

OCTOBER TERM, 1931

No. 265

L. A. NIXON, *Petitioner,*

against

JAMES CONDON AND C. H. KOLLE, *Respondents.*

RESPONDENTS' BRIEF.

PRELIMINARY STATEMENT.

The statement of the nature of the suit, the pleadings, the decision in the District Court and the decision of the Supreme Court of Appeals contained in petitioner's Application for Writ and in petitioner's Brief is substantially correct. The record of the case is not long and respondents deem it unnecessary to make an additional statement.

JURISDICTION.

Petitioner states that jurisdiction is provided by Sec. 41, Title 28 of the United States Code, which gives to the Federal District Courts original jurisdiction over suits of a civil nature at common law or in equity where the amount in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00, and arises under the Constitution or laws of the United States. It is disputed by respondents that the matter in controversy arises under (1) the Fourteenth Amendment to the Constitution of the Unit-

ed States; (2) the Fifteenth Amendment to the Constitution of the United States; (3) Section 31, Title 8 of the United States Code. The argument which will be made by respondents on the merits covers the objection to the ground of jurisdiction under the Fourteenth and Fifteenth Amendments. Also the argument made on the merits will cover the objection made to jurisdiction under Section 31, Title 8 of the United States Code. We may here state that a reading of Section 31, Title 8 of the United States Code limits the right to vote, without distinction of race, color or previous condition of servitude, to an *election by the people.* The Democratic primary, involved in this case, was not an election by the people, but constituted a nomination for an election by the people. The decision in Nixon v. Herndon is not applicable as that decision was limited expressly to a case arising under the Fourteenth Amendment.

The same objection to the grounds of jurisdiction under the Fourteenth and Fifteenth Amendments applies to the Court taking jurisdiction under Subdivision 11 of Section 41 of Title 28 of the Judicial Code.

No conspiracy is alleged to give the Court jurisdiction under Subdivision 12.

Subdivision 14 is apparently based upon the Fourteenth Amendment and the objection to jurisdiction under this Section will be met by the same argument applying to the Fourteenth Amendment.

SUMMARY OF RESPONDENTS' ARGUMENT.

I. The Fourteenth and Fifteenth Amendments to the United States Constitution are a limitation upon the power of a state, and do not affect private individuals or private associations of individuals.

II. The action of the Democratic Executive Committee

in excluding the petitioner from voting at a Democratic primary was not an action of the State of Texas.

(A) A political party has the inherent right to determine the qualifications of its own members.

(B) The Statute enacted by the Texas Legislature in 1923, declared unconstitutional in Nixon v. Herndon, was void and did not operate to diminish the power already possessed by the Democratic Party to determine the qualifications of its own members.

(C) The subsequent action of the Texas Legislature in enacting Chap. 67 of the Laws of 1927 did not affect this inherent power, except to limit it in two particulars, namely: Former political views or affiliations, and membership or non-membership in organizations other than a political party.

(D) By enacting Chap. 67 of the Laws of 1927 the Texas Legislature merely withdrew the State from an attempted unlawful interference with the rights of the Democratic party to determine the qualifications of its own members.

(E) The Legislature by enacting Chap. 67 of the Laws of 1927 recognized a power which had long existed in the Democratic party to determine its membership and did not delegate such power to the party.

(F) Respondents, Judges in the Democratic primary, were not officers of the State of Texas, and their action in denying petitioner a vote was not State action.

III. The Democratic primary involved was not an election of the people within the meaning of Sec. 31, Title 8 of the United States Code.

IV. The Fifteenth Amendment is a limitation only upon states, and the State did not deprive petitioner of his vote.

I.

The Fourteenth and Fifteenth Amendments to the United States Constitution are a limitation only upon the power of a state, and do not affect private individuals or private associations of individuals.

Section 1 of the Fourteenth Amendment reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifteenth Amendment reads as follows:

> "Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> "Section 2. The Congress shall have power to enforce this article by appropriate legislation."

Both amendments have been construed by this Court to apply only to action by a State of the United States, in distinction from an action of a private individual or an association of private individuals.

Slaughterhouse Cases, 16 Wall. 36; 83 U. S. 36.[1]

This proposition is admitted by petitioner. In paragraph I of his argument he states the only question before this Court is whether the invasion of this interest and this classification were the result of State action.

II.

The action of the Democratic Executive Committee in excluding the petitioner from voting at a Democratic primary was not an action of the State of Texas.

(A) A political party has the inherent right to determine the qualifications of its own members.

We believe it is conceded by all parties that in the absence of any action by the State a political party has the inherent right to exclude from its membership any person or class of persons it may desire excluded. No one can question the right of men to organize a party of men and exclude women from its ranks; no one can question the right of women to organize a party of women and exclude men from its ranks; no one can question the right of a group of individuals to organize a political party with its membership based upon stature, color of the hair or color of the skin. It seems to be conceded in petitioner's brief that the

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1 See also:
United States vs. Reese, et al., 92 U. S. 214, 128; United States vs. Cruikshank, et al., 92 U. S. 542; Strauder vs. West Virginia, 100 U. S. 303; Virginia vs. Rives, 100 U. S. 318; Ex Parte Virginia, 100 U. S. 339; Ex Parte Siebold, 100 U. S. 371; Neil vs. Delaware, 103 U. S. 370; United States vs. Harris, 106 U. S. 629, 641; Civil Rights Cases, 109 U. S. 3; Ex Parte Yarbrough, 110 U. S. 651, 664; Yick Wo vs. Hopkins, 118 U. S. 356, 365, 370, 373; In re Kemmler, 136 U. S. 436, 438, 448; McPherson vs. Blacker, 146 U. S. 1, 23-25; Gibson vs. Mississippi, 162 U. S. 565, 579; Carter vs. Texas, 177 U. S. 442; Wiley vs. Sinkler, 179 (fol. 30) U. S. 58, 65; Swafford vs. Templeton, 185 U. S. 487, 491; Giles vs. Harris, 189 U. S. 475, 485; James vs. Bowman, 190 U. S. 127, 136; Hodges vs. United States, 203 U. S. 1, 15, 19; Guinn vs. United States, 238 U. S. 347, 354; Meyers vs. Anderson, 238 U. S. 369; United States vs. Mosley, 238 U. S. 383; Buchanan vs. Warley, 245 U. S. 60; Love, et al., vs Griffith, et al., 266 U. S. 33; Corrigan vs. Buckley, 271 U. S. 323, 330; Nixon vs. Herndon, 273 U. S. 536, 540; Grigsby vs. Harris (D. C., S. D. Tex.), 27 F. (2d) 942.

Democratic party, prior to 1923 when Art. 3093-A (the Statute involved in Nixon v. Herndon) was passed by the Texas Legislature, had the right to exclude the negro from membership in that party.

The Texas Supreme Court has drawn a clear distinction between the State and a political party, and has defined a political party. [2] *Waples vs. Marrast,* 108 Tex. 5, 184 S. W. 180.

(B) The Statute enacted by the Texas Legislature in 1923, declared unconstitutional in Nixon v. Herndon, was void and did not operate to diminish the power already possessed by the Democratic Party to determine the qualifications of its own members.

In Nixon v. Herndon this Court held unconstitutional the Act of 1923, which will be referred to in this brief as the "old statute and the present Article 3107 will be termed the "new statute." Both articles are set out in full in pe-

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2 "A political party is nothing more or less than a body of men associated for the purpose of furnishing and maintaining the prevalance of certain political principles or beliefs in the public policies of the government. As rivals for popular favor they strive at the general elections for the control of the agencies of the government as the means of providing a course for government in accord with their political principles and the administration of those agencies by their own adherents. According to the soundness of their principles and the wisdom of their policies they serve a great purpose in the life of a government. But the fact remains that the objects of political organizations are intimate to those who compose them. They do not concern the general public. They directly interest, both in their conduct and in their success, only so much of the public as are comprised in their membership, and then only as members of the particular organization. They perform no governmental agency. The purpose of their primary elections is merely to enable them to furnish their nominees as candidates for the popular suffrage. In the interest of fair methods and a fair expression by their members of their preference in the selection of their nominees, the State may regulate such elections by proper laws, as it has done in our general primary law, and as it was competent for the legislature to do by a proper act of the character of the one here under review."

See also: Koy vs. Schneider, 110 Tex. 369, 218 S. W. 480, 221 S. W. 880; Cunningham vs. McDermott, 277 S. W. 218; Winnett vs. Adams, 71 Neb. 917, 99 N. W. 681; State vs. Kanawha County, 78 W. Va. 168. 88 S. E. 662, 20 A. L. R. 1030; Stephenson vs. Board of Electors, 118 Mich. 396, 76 N. W. 914, 42 L. R. A. 214; Phillips vs. Gallagher, 73 Minn. 528, 76 N. W. 285; Kearns vs. Hawley, 188 Pa. 116, 41 A., 273, 42 L. R. A. 235; Grigsby vs. Harris, 27 Fed. (2d) 942.

titioner's brief and will not be copied here. An act of the State Legislature, which is repugnant to the Constitution of the United States, is void and is never effective, and affords no protection to a person acting thereunder. It is illegal and without force from its inception. By enacting the old statute the Texas Legislature attempted to interfere in the management of the Democratic party regarding membership or non-membership of negroes. We submit this attempt was never consummated, but failed from its inception because repugnant to the Fourteenth Amendment. If our reasoning is correct, it follows that the enaction of the old statute did not change or vary any right then held by the Democratic party to determine the qualifications of its members. As stated before it is apparently granted by petitioner that the right existed. How then could the passage of an unconstitutional act change or prejudice a right then in existence?

In petitioner's brief, on pages 21 to 26, inclusive, he argues that the State by the passage of the old statute took over the right theretofore had by the Democratic party to provide the qualifications of its members. In support of this statement he cites *Briscoe v. Boyle,* 286 S. W. 275, and emphasizes statements in that opinion to the effect that the Legislature has taken possession and control of the machinery of political parties so as to deprive the parties and their managers of all discretion in the manipulation of that machinery and quotes the Court as follows:

> "By excluding negroes from participating in party primary elections, and by legislating upon the subject of the character and degree of party fealty required of voters participating in such elections, the Legislature has assumed control of that subject to the exclusion of party action."

It is thus seen that in making this decision the Texas Court of Civil Appeals regarded the old Statute as being valid, and

based its decision to a large extent upon the existence of that old Statute. After the decision in Nixon v. Herndon, that basis vanished, and is now seen to have never existed. This decision falls when these facts are considered:

(C) The subsequent action of the Texas Legislature in enacting Chapter 67 of the Laws of 1927 did not affect this inherent power, except to limit it in two particulars, namely: former political views or affiliations and membership or non-membership in organizations other than a political party.

Chapter 67 of the Laws of 1927 is the new Statute now under consideration, and was passed after the old Statute was declared unconstitutional in Nixon v. Herndon. We believe our previous argument and authorities establish the fact that the inherent power to exclude Petitioner in this case existed in the Democratic Party from its inception and was not affected or diminished by the passage of the old Statute. In spite of Petitioner's theory that the Texas Legislature had taken this power from the party, we find, upon analysis that such taking, if any, existed solely by virtue of the new Statute. A reading of this Statute shows it to be a limitation placed upon the Party by the Legislature. This limitation prevents the Party, through its Executive Committee, from excluding any person,

> "because of former political views or affiliations, or because of membership or non-membership in organizations other than political party."

The Legislature has here limited the powers of the parties in these two particulars, and in these two particulars only.

The decision by the Texas Supreme Court in *Love v. Wilcox*, 28 S. W. (2d) 515, holds this limitation valid. Even if Love v. Wilcox be correct, nevertheless, the only limitation placed upon the party by this Act was in these two men-

tioned particulars. If we are correct in our belief that up until the time of the passage of the new Statute the inherent power still remained in the Party, then this new Statute merely restricted the power in the two specifications. The restriction was held valid in Love v. Wilcox. The decision in Love v. Wilcox is merely to the effect that this restriction has been made by the Legislature and is valid. The grounds of the decision in Love v. Wilcox, are limited by the words of the decision itself, wherein the Court says:

> "We are not called upon to determine whether a political party has power, beyond statutory control, to prescribe what persons shall participate as voters or candidates in its conventions or primaries. We have no such state of facts before us. The respondents claim that the State Committee has this power by virtue of its general authority to manage the affairs of the party. The statute, article 3107, Complete Tex. St. 1928 (Vernon's Ann. Civ. St. art. 3107), recognizes this gentral authority of the State Committee, but places a limitation on the discretionary power which may be conferred on that committee by the party by declaring that, though the party through its State Executive Committee, shall have the power to prescribe the qualifications of its own members, and to determine who shall be qualified to vote and otherwise participate, yet the committee shall not exclude anyone from participation in the party primaries because of former political views or affiliations, or because of membership or nonmembership in organizations other than the political party."

In the express language of the decision, the Court construes Article 3107 as a limitation and not a grant of power. It follows that if the effect of Article 3107 was merely to limit the power already had by the Democratic Party, and such Statute did not take away the right of the Party to exclude Petitioner because of his color; then, this right to exclude Petitioner because of his color rests in the Party, where it has always rested and where it is now undisturbed by the State of Texas.

We may here call attention to the fact that the previous decision of this court in Nixon v. Herndon does not control the decision of this case. In Nixon v. Herndon this court held that the Legislature of Texas may not pass an act excluding the negro from the primary of the Democratic party. Had the legislature attempted by statute to exclude the negro from the Masonic Lodge, the Baptist Church, or any organization having no connection with political parties, such an act would have been in violation of the Fourteenth Amendment and void. Therefore, an entirely new situation is here presented, not controlled by Nixon v. Herndon. The very fact which appeared of record as true in Nixon v. Herndon—that the State of Texas had itself excluded the negro—is here the question before the court.

(D) By enacting Chap. 67 of the Laws of 1927 the Texas Legislature merely withdrew the State from an attempted unlawful interference with the right of the Democratic party to determine the qualifications of its members.

(E) The Legislature by enacting Chap. 67 of the Laws of 1927 recognized a power which had long existed in the Democratic party to determine its membership and did not delegate such power to the party.

In petitioner's brief, he states that the Legislature could not recognize the inherent power, because no inherent power was in existence after the State had exercised sovereignty over the right. We have just shown that the State had not exercised its sovereignty, but had merely attempted to do so. Petitioner follows with the statement that whether this be regarded as the creation of a new power or the recognition and restoration of an old one, the existence of the power itself would be necessarily and wholly dependent upon the force of the statute and hence would be a statutory power,

not an inherent one. We find therein no authorities to support this remarkable statement. We do not conceive it possible that because the State enacts a void law, one beyond its power to enact, it cannot then withdraw from the field which it attempted to usurp and leave that field in the condition in which it previously existed. If petitioner is correct in this reasoning, then every law repealed by the State has the effect of being a grant of power by the State. The citizens relieved of burdens by the repeal owe the right to transact their affairs in the same fashion as before to a statutory power. As an example, should the State enact a law requiring the directors of all corporations in the State to hold their meetings in the State Capitol, the repeal of that law by the State, is a grant of power by the State to the directors. If petitioner is correct in his statement, then every meeting held after the repeal of the law is derived from force of the statute and a statutory meeting.

Petitioner further argues that because the Texas statutes regarding the conduct of primary elections recognize in the Executive Committee the right to perform certain functions which the party has always performed, it is an expression of legislative intention which turns a private affair into a State affair. Petitioner contends that recognition by the Legislature of the power of the Democratic party to determine its own membership deprives the party of that right. If this be true, then all that is needed to turn every church in the State of Texas into an agency of the State is for the Legislature to pass an act stating that each church may make such requirements as it sees fit for membership in that church. The enactment of such a statute would prevent a church congregation, a lodge, or any other group from excluding the negro. Every action of that church or lodge would be State action—if petitioner is correct.

Every court which has passed upon the statute in ques-

tion has construed it to be a withdrawal by the State and a recognition of the party's rights by the State.

Nixon v. Condon, 34 Fed. (2d) 464, 49 Fed. (2d) 1012,
Love v. Wilcox, 28 S. W. (2d) 515,
White v. Lubbock, 30 S. W. (2d) 72,
Grigsby v. Harris, 27 Fed. (2d) 972.

We refer the Court particularly to the opinion of Judge Hutcheson in Grigsby v. Harris.

Petitioner devotes considerable argument to the effect that the emergency clause attached to the new statute shows of itself the intent by the Legislature to deprive petitioner of membership in the Democratic party by legislation. Aside from the fact that in this day of crowded legislative hoppers, every bill introduced in the Texas Legislature has a similar emergency clause attached, the language of the bill shows no intent to achieve such result. The previous action of the legislature in passing an unconstutional act, unlawfully invading the right of the Democratic party to manage its affairs, created a public necessity that the State withdraw its unlawful interference. It is only reasonable for any state to regard the removal of unconstitutional legislation as an emergency. This Court has previously looked at the language of a statute itself to determine its validity, and disregarded the fact that an additional result may be accomplished. In *United States v. Doremus*, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. 493, this Court said, "An act may not be declared unconstitutional because its effect may be to accomplish a purpose in addition to tax." In the Doremus case, the Court analyzed the statute, and held that the statute did not show on its face any unconstitutional regulation. The statute now under consideration certainly shows on its face no purpose by the State to exclude the negro.

A study of cases adduced by petitioner shows that in

Yick Wo v. Hopkins, 118 U. S. 356, and in every case cited by him in connection therewith, no question was raised that anyone but the public authorities was applying the statute. The effect of Yick Wo v. Hopkins is limited by the opinion to application of laws by the public authorities charged with their administration. In *Standard Scales Company v. Farrell,* 249 U. S. 577, an Inspector of Weights and Measure, clearly a State Officer, was involved. *Home Telephone & Telegraph Company v. Los Angeles,* 227 U. S. 278, involved the order of a municipal commission exercising power as an instrumentality of the State.

In the *Child Labor Tax case,* 259 U. S. 20, this Court examined the statute in question and held, "The purpose to regulate child labor follows from enforcement of the statute itself, is apparent and is not dependent upon the acts of individuals." It was not necessary to show any facts in addition to the language of the statute itself to show the purpose. Petitioner is now trying to make that decision apply to a statute that does not show on its face any unlawful purpose. We believe the decision in the Doremus case disposes of his contention.

In order to sustain petitioner's theory it is necessary to presume that the State intended to exceed its authority, to presume that the State delegated to the Committee powers which it already possessed, to presume that the Committee was an agent of the State, without which presumptions, petitioner's theory cannot be sustained. On the contrary, withdrawal of interference by the State leaves the power in the original resting place, the Democratic party.

(F) Respondents, Judges in the Democratic primary, were not officers of the State of Texas, and their action in denying petitioner a vote was not State action.

Our preceding argument applies with equal force to this statement. The record shows that the judges are not paid by the State, but by the party; are not selected by the State, but by the party. It is true that their duties are regulated in many details by the statutes. However, regulation to insure fair primaries does not necessarily mean that the party officers become State officers. Texas, in common with many other States, has proscribed many and detailed regulations for the conduct of private corporations. The State has limited the purposes for which corporations may be organized, has required a charter from the State, has placed a minimum upon the number of incorporators, has declared that fifty per cent of the capital stock must be paid in cash, and all the stock subscribed; has provided that married women may become stockholders free from the usual disabilities of coverture; has prescribed certain powers; has provided for the election of officers; has prescribed the powers of directors; has required a record to be kept of all stock; has required the payment of dividends in certain cases; has regulated the voting by stockholders; has prohibited a corporation from contributing funds to the election or defeat of any political candidate, any political campaign, or any question to be decided by the voters; has limited the issuance of stock; has directed the principal office to be in Texas; has limited the purchase of lands; has provided for examination of the corporate books by the Attorney General; has provided for dissolution; and has enacted laws limiting the conduct of corporations in infinite detail. Yet no one seriously contends that a private corporation is the agent of the State. No one claims that the corporate officers are officers of the State. Mere regulation does not create an adoption by the State. If petitioner is correct in declaring that the Legislature has made the Democratic Executive Committee and the primary judges officers of the State, then it has made every corporate officer an officer of the State. He contends that

the selection and terms of the members of the Executive Committee is regulated by the State. If this regulation results in the creation of State officers, then so does the regulation of corporations create State officers.

Petitioner states in several places that the Texas primary laws apply only to the Democratic party. He is mistaken in this assertion. (Page 36, Petitioner's Points). Art. 3101 applies the primary laws to all parties which cast more than 100,000 votes at the last election. In 1924, the Republican Candidate Butte polled 294,970 votes against the Democrat Ferguson's 422,558. In 1928, Republican Presidential electors were elected by Texas, and Holmes, the Republican candidate for Governor received 120,504 votes. [3] It thus appears that petitioner is misaken in his various statements to the effect that this Statute applies and has always applied only to the Democratic party. His argument regarding the legislative intent loses considerable force when the correct facts are known.

III.

The Democratic primary involved was not an election of the people within the meaning of Sec. 31, Title 8 of the United States Code.

Petitioner claims as ground for jurisdiction that the case arises under Sec. 31, Title 8, U. S. C. A. This section was passed by Congress on May 31, 1870, and states that "all citizens of the United States, who are otherwise qualified by law to vote at any election *by the people* in any state, etc., shall be entitled and allowed to vote * * *." Apparently this Section is based upon the Fifteenth Amendment and shows Congressional intent as to the meaning of the Fifteenth Amendment, the amendment and the statute

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3 1926 Texas Almanac, p. 19. 1931 Texas Almanac, p. 260.

being passed at almost the same time. We thus see the Congressional intent regarding the vote contemplated by the Firteenth Amendment. By statute Congress has limited this right to vote to an election of the people. A party nomination is not an election of the people, but is merely the choosing of a candidate by that party, and conquently petitioner fails to show jurisdiction under this section or to state any cause of action against respondents under the statute.

IV.

The Fifteenth Amendment is a limitation only upon states, and the State did not deprive petitioner of his vote.

We have heretofore presented our contention that the Fourteenth Amendment is a limitation only upon the power of a state, and that no state action is involved in this case. The Fifteenth Amendment is likewise limited to action by a state. The same rules of construction apply and the same arguments that we advanced in discussing the Fourteenth Amendment apply with equal force to the Fifteenth Amendment. We shall not repeat or recount these arguments

Petitioner claims his right to vote was abridged even if not denied. Unless this right was abridged by the State petitioner has stated no cause of action.

We submit that the foregoing argument shows that no action of the State denied or abridged petitioner's right to vote.

CONCLUSION.

We may summarize our argument briefly to the effect that the issue in this case is whether or not action by the State is involved. We have shown that the Democratic party has always possessed power to do the thing complain-

ed of by petitioner. That the State's attempted interference was unconstitutional and void, leaving this power where it had always been. The statute in question did not consist of a grant of any new power, but was either a limitation in regard to two particulars upon the power of the committee, a withdrawal by the State from an unauthorized field of activity, or a recognition of power in the committee which already existed. In either event the committee did not rely upon the State for its power exercised in this case. We do not deign to answer the threat in petitioner's conclusion that the disenfranchised are fruitful soil for communist propaganda, as we do not think this Court will be influenced by such statements.

It is respectfully submitted that the judgment appealed from should be affirmed.

THORNTON HARDIE,
BEN R. HOWELL,
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